

1992

State of Utah v. Archuleta : Brief of Appellee

Utah Court of Appeals

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Paul R. Frischknecht; Attorney for Appellant.

Jan Graham; Attorney General; J. Kevin Murphy; Assistant Attorney General; Attorney for Appellee.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920388 IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920388-CA
v. :
PATRICK ARCHULETA, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE
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APPEAL BY DEFENDANT OF CONVICTION FOR
POSSESSION OF A DANGEROUS WEAPON BY A
RESTRICTED PERSON, A THIRD DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. § 76-10-503(2)
(SUPP. 1992), UPON JURY TRIAL IN THE SIXTH
JUDICIAL DISTRICT COURT, IN AND FOR SANPETE
COUNTY, UTAH, THE HONORABLE DON V. TIBBS,
PRESIDING.

JAN GRAHAM (1231)
Attorney General
J. KEVIN MURPHY (5768)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021


Attorneys for Appellee

PAUL R. FRISCHKNECHT (1129)
50 North Main Street
Manti, Utah 84642

Attorney for Appellant

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Clerk of the Court

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JAN GRAHAM (1231)
Attorney General
J. KEVIN MURPHY (5768)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Appellee

PAUL R. FRISCHKNECHT (1129)
50 North Main Street
Manti, Utah 84642

Attorney for Appellant

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Patrick Archuleta appeals his conviction for possession of a dangerous weapon by a restricted person, a third degree felony, in violation of Utah Code Ann. § 76-10-503(2) (Supp. 1992). The conviction was entered upon a jury verdict in the Sixth Judicial District Court, in and for Sanpete County, Utah, the Honorable Don V. Tibbs, presiding (R. 136, 141-42). This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

ISSUES PRESENTED ON APPEAL
AND
STANDARDS OF APPELLATE REVIEW

The State believes that the issues presented by defendant can be resolved most expeditiously under the waiver or procedural default principle, as follows:

Does defendant's failure to request an appropriate remedy, at trial, for the prosecutor's alleged failure to timely comply with a discovery request, effectively waive his claim, on appeal, of a prejudicial discovery violation? This question is one of law, decided upon de novo examination of the record.

State v. Knight, 734 P.2d 913, 919 n.6 (Utah 1987); State v. Christofferson, 793 P.2d 944, 948 (Utah App. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This appeal implicates Rule 16, Utah Rules of Criminal Procedure. The specific portions of that rule at issue here-- Rules 16 (a), (b), and (g)--are reproduced in defendant's Brief of Appellant at 4-5, and will be further set forth, as needed, in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with possession of a dangerous weapon by a restricted person (R. 1).¹ At trial, he objected to the admission of a videotape that showed him committing the offense (T. 157-58). The objection was overruled, and the tape was shown to the jury, which returned a guilty verdict (R. 136). Pursuant to the verdict, defendant was sentenced to a term of zero to five years at the Utah State Prison (R. 141-42).

STATEMENT OF FACTS

The Offense

This appeal arises from a disturbance at the Central Utah Correctional Facility in Gunnison, Utah, involving defendant and John Gallegos, both inmates in that facility (R. 1). Much of that disturbance was recorded by video camera. The videotape (R.

¹Main record references are designated "R." The transcript of defendant's May 11, 1992 trial is referenced as "T." The videotape includes a visual display of the date and time that will also be parenthetically referenced as needed. The displayed times are one hour ahead of the actual times, because the video camera was still set on daylight savings time when the disturbance was recorded (video display 11/9/91 at 4:30 PM).

152), shows that during the course of the disturbance, defendant possessed and brandished a broken, rather sharp-appearing piece of broomstick (video display 11/9/91 at 4:40 to 4:53 PM). At trial, defendant admitted to possession of the stick (T. 186-92).

Trial Court Proceedings

Well before trial, defense counsel filed a request for discovery that asked the prosecution to provide to him, among other things, a copy of the incriminating videotape (R. 8). Defendant and Gallegos also filed their own pro se discovery requests (R. 10-16).

No written prosecution response to the discovery requests appears in the record. However, a minute entry reflects that the prosecutor acknowledged the requests at the preliminary hearing, roughly thirty days after the requests were made, and agreed to comply (R. 23).

Another fifty days later, but still five days before trial, a copy of the videotape was provided to defense counsel (R. 8; T. 159). An additional copy was provided to defendant and Gallegos; however, Gallegos destroyed that tape (T. 159). Therefore, while counsel had five days to review the videotape, defendant himself may not have viewed it until roughly thirty-six hours before trial (T. 158).

Complaining of the short time provided for his client to view the videotape, defense counsel objected to its admission as a trial exhibit. Through counsel, defendant also objected to the tape's admission because it contained a seven-minute gap (T.

157-58). The tape recounts that the recording gap was attributed to a recorder battery change (video display 11/9/91 at 4:40 PM).

Defendant's objection to the videotape was overruled (T. 161). Defendant thereafter did not request a continuance or recess to allow further preparation to meet this evidence. The transcript of defendant's objection to the videotape, and the trial court's resolution of the objection (T. 157-62), is copied in the Appendix to this brief.

SUMMARY OF ARGUMENT

Defendant has waived his opportunity to complain of the alleged discovery violation on appeal. Even assuming that a violation did occur, defendant failed to request a continuance in order to remedy any unfairness such violation may have worked upon him. Under well-settled law, this omission operates to deny him relief on appeal, and his conviction should be affirmed.

ARGUMENT

BECAUSE DEFENDANT DID NOT REQUEST APPROPRIATE MITIGATING RELIEF AT TRIAL, HE HAS WAIVED ANY COMPLAINT, ON APPEAL, OF PROSECUTORIAL NONCOMPLIANCE WITH DISCOVERY RULES.

On appeal, defendant complains that the trial court improperly failed "to exclude the videotape or to take other remedial measures," in response to his assertion that the prosecutor had violated his discovery obligation (Br. of Appellant at 13, 15 (emphasis added)). This complaint can be summarily rejected, because defendant, upon the trial court's denial of his request to exclude the videotape from evidence, failed to request any other remedial measures.

Even where a violation of prosecutorial discovery obligations is established, the defendant is obliged to request relief, in the trial court, to mitigate any resulting harm. State v. Knight, 734 P.2d 913, 919 n.6 (Utah 1987); State v. Christofferson, 793 P.2d 944, 948 (Utah App. 1990). Further, the defendant must request appropriate alternative relief if his or her request for a harsh sanction is denied. A failure to request such alternative relief--typically a trial continuance--effectively waives any complaint of the discovery violation on appeal. See State v. Larson, 775 P.2d 415, 418 (Utah 1989) (defendant's motion to dismiss, because of prosecutor's discovery violation, was denied; appellate relief denied where defendant did not then renew his continuance request); State v. Griffiths, 752 P.2d 879, 882-83 (Utah 1988) (defendant's objection to admission of his out-of-court statements, not previously disclosed by the prosecution, was overruled; failure to request alternative relief waived discovery complaint on appeal).

In this case, defendant objected to admission of the videotape into evidence, as permitted under Rule 16(g), Utah Rules of Criminal Procedure, for discovery violations. However, Rule 16(g) specifies "other, less harsh remedies," Christofferson, 793 P.2d at 948, for discovery violations. Prominent among those remedies is a trial continuance, allowing the aggrieved party additional time to deal with the tardily-produced discovery material.

Defendant now complains that he and counsel did not have adequate time to review the videotape together, and to plan a more effective strategy to rebut this powerful evidence at trial (Br. of Appellant at 12, 14). However, when his request to exclude the videotape altogether was denied, defendant failed to request a continuance, or even a trial recess, which would have given him additional preparation time. Having solely asked the trial court to exclude the videotape, and having not asked for any less harsh, alternative remedial measure when that request was denied, defendant has waived his opportunity to complain, in this Court, of any discovery violation. On this basis alone, his conviction should be affirmed.

While defendant's conviction should be affirmed under the waiver or procedural default principle, it may be worth noting that the record reveals no explanation for the prosecutor's long delay in providing the videotape, in response to defendant's discovery request. If no such explanation exists, the State's appellate counsel, like this Court, cannot condone the prosecutor's tardiness. Cf. Christofferson, 793 P.2d at 948.

Even so, that tardiness cannot realistically be said to have compromised the defense here. Defense counsel did, after all, have five days before trial to review the videotape himself (Br. of Appellant at 7). With relative ease, he could have then spoken with defendant by telephone to relate his observations, and to discuss ways of dealing with the damaging evidence recorded on the tape. In fact, defense counsel exploited the

videotape's seven-minute gap during his closing trial argument, impeaching the accuracy of testimonial evidence about the events that occurred during the recording interruption (T. 213).

Further, it is most difficult to discern how, even if given generous additional time, defense counsel might have persuaded the jury that the broken broomstick possessed by defendant was not a dangerous weapon (cf. Br. of Appellant at 15). The videotape shows defendant wrapping his hand with some type of tape or strip of cloth, possibly fixing the broomstick to his hand in this fashion. Then, rather close up, and close to the plexiglas barrier between himself and the onlooking guards, defendant is seen brandishing the sharp-appearing broomstick while complaining about the prison conditions (video display 11/9/91 at 4:40 to 4:53 PM).² It would take an extraordinary magician, dealing with an unusually gullible audience, to conjure up any reasonable doubt that the broomstick, so used, was a dangerous weapon.

In short, defendant was not prejudiced by the prosecutor's delayed response to his discovery request. Thus

²Utah Code Ann. § 76-10-501(2)(c) (Supp. 1992) defines "dangerous weapon" as follows:

"Dangerous weapon" means any item that in the manner of its use or intended use is capable of causing death or serious bodily injury. In construing whether an item, object, or thing not commonly known as a dangerous weapon is a dangerous weapon, the character of the instrument, object or thing; the character of the wound produced, if any; and the manner in which the instrument, object or thing was used are determinative.

The jury was instructed under this definition (R. 109).

even if defendant's discovery complaint had not been waived on appeal, he would not be entitled to relief.

CONCLUSION

For the foregoing reasons, defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 09 day of March, 1993.

JAN GRAHAM
Attorney General



J. KEVIN MURPHY
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to PAUL R. FRISCHKNECHT, attorney for defendant-appellant, 50 North Main Street, Manti, Utah 84642, this 09 day of March, 1993.



APPENDIX

Transcript of Defendant's Objection to Admission of the Videotape

1 outside the presence of the jury. I'll hear you, counsel.

2 PLAINTIFF'S EVIDENCE PROFFER

3 MR. BLACKHAM: Thank you, Your Honor.

4 Your Honor, the State next intends to offer, as
5 evidence for the jury to view, portions of a video tape that
6 was produced while this incident was going on. The tape
7 itself approaches two hours long. The State does not
8 intend, nor want to show the entire two hours of this
9 episode to the jury. We do want to show a portion of the
10 tape, that portion of the tape which would show Mr.
11 Archuleta in possession of this broom stick that's been
12 described all day.

13 I think it's relevant for the purpose of it's
14 showing him being in possession of it, Your Honor, so I want
15 formally proffer that recording and afford counsel any
16 opportunity to object to it, if he desires. I'm going to
17 have the Court view the same, also, Your Honor, before the
18 jury.

19 THE COURT: Any objection, Counsel?

20 MR. FRISHCKNECHT: I do, Your Honor. I object to
21 the tape, in any of its portion, being shown to the jury for
22 two reasons. The testimony that has been heard, Your Honor,
23 with regard to a portion of the broom stick in Mr.
24 Archuleta's hand directed toward Officer Taylor, is for
25 whatever reason missing from the tape. It's not on the

1 tape. There is about a seven-minute block of the tape that
2 is just nonexistent, during which time it was supposedly or
3 allegedly when the broom handle was in Mr. Archuleta's hand,
4 directed toward Officer Taylor, and the threatening
5 statement made.

6 The other ground which I object to showing any
7 portion of the tape to the jury, Your Honor, is that the
8 defendant was not able to view the tape himself until
9 Saturday night at 9:00 o'clock. That has meaning, Your
10 Honor, because that affords me from Saturday night until
11 Monday morning an unreasonably short period of time in which
12 to deal with that and prepare the defense with my client.
13 The motion for discovery--Your Honor, I was appointed in
14 this case on the 5th day of February and I made a motion for
15 discovery which specifically addressed tapes on the 14th day
16 of February. I was not able to view it or get it in my
17 possession until last week, about Tuesday or Wednesday.
18 Primarily because Mr. Archuleta didn't see it till Saturday
19 night, that's an unreasonable lack of sufficient amount of
20 time in which to prepare the defense, Your Honor.

21 THE COURT: You saw it last Tuesday, or Wednesday?

22 MR. FRISHCKNECHT: Yes.

23 THE COURT: All right.

24 MR. BLACKHAM: Your Honor, the portion of the
25 video which we intend to have the jury view is that portion

1 of the video that there has been testimony with about him
2 having the broken broom stick and wrapping something around
3 his hand to stabilize it. It's that portion of the video
4 which we desire the jury so to see as corroborative of the
5 testimony, Your Honor.

6 THE COURT: Now it's my understanding--did I
7 understand this, that you told me earlier in Chambers that
8 you did make this tape available to Mr. Gallegos,--

9 MR. BLACKHAM: Yes, Your Honor.

10 THE COURT: --but Mr. Gallegos destroyed the tape
11 in the machine?

12 MR. BLACKHAM: The tape was delivered by my office
13 to Mr. Frischknecht last Tuesday, Your Honor, for his
14 purposes. A copy was then made for the inmates to view here
15 in the prison so they could see it themselves, independently
16 of what Mr. Frischknecht had access to. So I think the
17 State really went above and beyond, Your Honor, what we
18 needed to do.

19 We made another copy so that they could have a
20 copy, as well as Mr. Frischknecht have one, himself, to
21 view. That was provided for them, Your Honor. Investigator
22 Evans here advised me, Your Honor, that in that process of
23 the inmate's viewing it, while the guard was called to
24 answer a telephone, that inmate Gallegos hurried and grabbed
25 the tape and destroyed that particular copy of it; am I

1 correct, Investigator Evans

2 MR. EVANS: That's my understanding, Your Honor,
3 yes.

4 MR. BLACKHAM: And I don't know how much of the
5 tape had been viewed before that, Your Honor, whether
6 they--I don't believe they had got through it all. But it
7 was given them and given an opportunity, and that copy of
8 the video tape was destroyed by inmate Gallegos.

9 MR. FRISHCKNECHT: Well, in response to that, Your
10 Honor, my client shouldn't suffer because of Gallegos's
11 conduct of breaking the tape up. My client shouldn't be
12 prejudiced because of that. But to have, Your Honor,
13 roughly 30 plus hours to view the tape, and then have a
14 Sunday between then and the trial date, I just don't think
15 that's fair, Your Honor.

16 MR. BLACKHAM: Well, Your Honor, and I--

17 MR. FRISHCKNECHT: And let me--

18 MR. BLACKHAM: Okay. Go ahead, Paul.

19 MR. FRISHCKNECHT: Excuse me.

20 I think it prejudices my client, Your Honor. What
21 all the testimony primarily has been about is the threats
22 that he made with that broom handle in his hand. We don't
23 have that on the tape.

24 THE COURT: Well, that's something you can argue
25 about, isn't it?

1 MR. FRISHCKNECHT: Well, if it comes to that, I
2 certainly intend to, Your Honor, but because that's
3 primarily what the thrust of the evidence has been and then
4 we show a tape that shows something else and doesn't even
5 show what this case is all about, I think that prejudices my
6 client.

7 THE COURT: All right. Thank you.

8 Did you have something further?

9 MR. BLACKHAM: I'm ready, Your Honor.

10 THE COURT: Well the objection is overruled. Why
11 he would destroy a tape? That's tough.

12 MR. BLACKHAM: Your Honor, I would also proffer a
13 testimony that I would call the officer who was operating
14 the machine, to identify this is the correct tape. And if
15 you want to hear, maybe we ought to hear that, preliminary
16 to the jury.

17 THE COURT: I don't think so. Bring the jury
18 back, call the officer and identify and show the tape.
19 Could you bring the jury back.

20 MR. BLACKHAM: Your Honor, I don't know. I guess
21 we could swing this TV around--

22 [INDICATED MONITOR MOUNTED ON COURTROOM WALL]
23 --and I guess they could see that. I'm a little bit
24 concerned that in case they've got bad vision, like I do,
25 that--

1 THE COURT: You can ask them.

2 MR. BLACKHAM: Okay.

3 THE COURT: How long is it? It was only a couple
4 of minutes, wasn't it?

5 MR. BLACKHAM: It will be shorter than that.
6 Probably two minutes, Your Honor.

7 THE COURT: All right.

8 [JURY RETURNED TO COURTROOM]

9 PROCEEDINGS CONTINUED WITH JURY

10 THE COURT: The record should indicate the jury
11 has returned.

12 You can call your next witness, please.

13 MR. BLACKHAM: Officer Wayne Larsen.

14 THE COURT: Will you raise your right hand and be
15 sworn, please.

16 [WITNESS SWORN]

17 WAYNE LARSEN, called and sworn at the instance of
18 plaintiff, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. BLACKHAM:

21 1 Q Officer Larsen, please state your name and your
22 occupation please.

23 A I'm Wayne Larsen, and I'm a correctional
24 supervisor for the Department of Corrections.

25 2 Q Were you on duty the afternoon of November 9th,